BEFORE THE
ADMINISTRATIVE RULES COMMITTEE
OF THE NORTH DAKOTA LEGISLATIVE COUNCIL

Amendments to N.D. Admin. Code	**)**	**REPORT OF THE**
Chapter 75-02-02.1, Eligibility for	**)**	**DEPT. OF HUMAN SERVICES**
Medicaid (Pages 1075-1215)	**)**	**July 16, 2003**

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For its report, the North Dakota Department of Human Services states:

1. **Some of the amendments to this chapter resulted from statutory changes made by the Legislative Assembly. The amendments to sections 75-02-02.1-19.1, 75-02-02.1-25 and 75-02-02.1-26 were made to implement 2003 SB 2074 regarding family coverage group. The addition of section 75-02-02.1-24.1 regarding eligibility for breast and cervical cancer early detection coverage was made to implement 2003 SB 2089. The amendments to section 75-02-02.1-33.1 regarding disqualifying transfers include provisions to implement 2003 SB 2384 regarding annuities. The amendments to section 75-02-02.1-31.1 regarding trusts for individuals with disabilities implement 2003 SB 2047. The amendments to section 75-02-02.1-33.1 (in subsections 13 and 14) implement 2003 HB 1469 regarding the effect on Medicaid eligibility of the purchase of long term care insurance.**

2. **Some of these amendments are related to changes in federal statutes or regulations.**

3. **The Department of Human Services uses direct mail and electronic mail as the preferred ways of notifying interested persons of**

proposed rulemaking. The department uses a "basic" mailing list for each rulemaking project that includes the county social service boards, the regional human service centers, all Legal Aid offices in North Dakota, all persons who have asked to be on the basic list, and internal circulation within the department. Additionally, the department constructs relevant mailing lists for specific rulemaking. The department also places public announcements in all county newspapers advising generally of the content of the rulemaking, of over 50 locations throughout the state where the proposed rulemaking documents may be reviewed, and stating the location, date, and time of the public hearing.

The department conducts public hearings on all substantive rule-making. Oral comments are recorded. After the hearing, oral comments as well as any written comments that have been received are summarized and presented to the department's executive director, together with any response to the comments that may seem appropriate and a redrafted rule incorporating any change occasioned by the comments.

4. No one appeared or made comments at the public hearing held in Bismarck of February 25, 2003. Three individuals appeared and made comments at the public hearing held in Bismarck on April 15, 2003. Five individuals provided written comments. The department fully considered each comment. A summary of those comments is attached to this report. The summary identifies the commentors, describes each comment, explains the department's response to each comment, and identifies changes made in the rule to address comments.

5. **No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule amendments are anticipated to have a significant fiscal impact on the regulated community. A regulatory analysis was prepared and is attached to this report.**

6. **The approximate cost of giving public notice and holding a hearing was $1,902.99.**

7. **The amendments to North Dakota Administrative Code chapter 75-02-02.1 are found in pages 1075 through 1215 of your materials. This chapter deals with eligibility for Medicaid. The amendments to this chapter were made to implement state law changes, federal law changes and to update the chapter as a whole.**

<u>Section 75-02-02.1-01. Definitions.</u> This section was amended to remove the definition of "aid to families with dependent children", "earned income", "medicaid unit", "persons deemed to be receiving aid to families with dependent children", "pre-need funeral service contract", "Title IV-A", "Title IV-D", "Title XVI", and "unearned income". Definitions of "deprived child", "healthy steps", "home and community based services", "poverty level", "temporary assistance for needy families", and "Title XIX" were added. The definition of "blind", "disabled", "good faith effort to sell", "institutionalized person" "living independently", "Medicaid", and "property which is essential to earning a livelihood" were amended.

<u>Section 75-02-02.1-02. Application and redetermination.</u> This section was amended to remove "person" and replace it with "individual", to clarify who must sign an application, and to define when a redetermination must be completed.

Section 75-02-02.1-02.1. Applicant's or guardian's duty to establish eligibility. **This section was amended to clarify the applicant or recipient's duty to provide information sufficient to establish eligibility.**

Section 75-02-02.1-03. Decision and notice. **This section was amended to clarify when an applicant must be notified of an eligibility determination.**

Section 75-02-02.1-04. Screening of recipients of certain services. **This section was amended to add that applicants or recipients who seek services in institutions for mental disease must demonstrate medical necessity and such demonstration must be based on a screening provided by the department.**

Section 75-02-02.1-04.1. Certification of need for children in an institution for mental disease. **This is a new section added to outline the certification process for children under the age twenty-one seeking services in an institution for mental disease.**

Section 75-02-02.1-05. Covered groups. **This section was amended to remove references to "aid to families with dependent children", to add a category for uninsured women under age sixty-five who need treatment for breast or cervical cancer, to add family coverage groups to replace coverage formerly available to AFDC recipients, and to add a category for qualifying individuals entitled to Medicare part A benefits.**

Section 75-02-02.1-06. Applicant's choice of aid category. **This section was amended to remove the word "person" and replace it with "individual".**

Section 75-02-02.1-08. Selecting medicaid unit members. **This section was amended to explain who may become a member of a Medicaid unit.**

Section 75-02-02.1-08.1. Caretaker relatives. **This is a new section that describes who may be treated as a caretaker relative of a Medicaid eligible child, and when such caretaker relatives may be found eligible for Medicaid.**

Section 75-02-02.1-09. Assignment of rights to recover medical costs. **This section was amended to clarify the requirement of assignment of rights to payment or benefits from any third party or private insurer and support from any absent parent**

Section 75-02-02.1-10. Eligibility – Current and retroactive. **This section was amended to clarify Medicaid eligibility for individuals receiving benefits from another state, and that a child cannot be eligible for Medicaid for the period of time he or she is covered under the Healthy Steps program.**

Section 75-02-02.1-11. Need. **This section was amended to distinguish between "need" and the necessity for a particular medical service.**

Section 75-02-02.1-12. Limitation on eligibility. **This section was amended to rename the section to "Age and identity" and to state the**

age and identity requirements that are conditions of Medicaid eligibility.

Section 75-02-02.1-12.1. Payment of health insurance premiums, coinsurance, and deductibles. This section was amended to rename the section "Cost effective health insurance coverage", to remove specific reference to "employer group health plan", and to provide that any recipient who is enrolled in a cost-effective health plan may have the premium paid by Medicaid but not the coinsurance or deductibles and that the recipient must take any optional coverage provided through a cost-effective health plan when it is cost effective to do so.

Section 75-02-02.1-13. Social security numbers. This section was amended to provide when a social security number may not be needed.

Section 75-02-02.1-14. Blindness and disability. This section was amended to provide that the state review team will perform reviews of eye examination reports.

Section 75-02-02.1-15. Incapacity of a parent. This section was amended to clarify that a parent's incapacity may arise out of either the inability to earn a livelihood or to function as a homemaker or provider of childcare.

Section 75-02-02.1-16. State or residence. This section was amended to replace "person" with "individual", to clarify generally residency of children, to clarify the state of residence of migrant or seasonal farm workers, and to provide a definition of "institution".

Section 75-02-02.1-17. Application for other benefits. **This section was amended to clarify when a Medicaid applicant is required to apply for retirement and similar benefits.**

Section 75-02-02.1-18. Coverage for Aliens. **This section was amended to rename the section "Citizenship and alienage" and to explain when aliens may be found eligible for Medicaid.**

Section 75-02-02.1-19. Inmates of public institutions not covered – Exceptions. **This section was amended to remove "not covered – Exceptions" from the title of the section, to correct a reference to a federal regulation, and to remove language that repeats portions of the federal regulation.**

Section 75-02-02.1-19.1. Family coverage group. **This is a new section that describes the coverage group for families that would have been eligible for Medicaid if the 1996 AFDC program remained in effect. Among other things, this section implements a "100 hour rule" which limits Medicaid eligibility for adults in two-parent families in this group to those that include a primary wage earner who works less than 100 hours a month. Such individuals would have been ineligible for AFDC in 1996.**

Section 75-02-02.1-20. Extended medicaid benefits to certain families who cease receipt of aid to families with dependent children benefits. **This section was amended to replace references to "families who cease receipt of aid to families with dependent children benefits" with references to families who were "eligible under the family coverage group", and to provide that children who**

no longer meet age requirements are not eligible for transitional or extended Medicaid benefits.

Section 75-02-02.1-21. Continuous eligibility for pregnant women and newborns. This section was amended to clarify eligibility for pregnant women.

Section 75-02-02.1-22. Eligibility of qualified medicare beneficiaries and special low-income medicare beneficiaries. This section was amended to replace the terms "qualified medicare beneficiary" and "special low-income medicare beneficiaries", and to add coverage for the new "qualifying individuals" all under the heading "Medicare savings programs" (a term that has come into general use by the federal Medicaid agency), to describe the Medicare cost-sharing benefits available to qualifying individuals, and to remove references to excluded assets that are consolidated in new section 75-02-02.1-28.1.

Section 75-02-02.1-23. Eligibility of qualified disabled and working individuals. This section was amended to remove references to exclude assets that are consolidated in new section 75-02-02.1-28.1 and to provide that annual title II cost of living allowance will be disregarded when determining eligibility for this group for the first three months of each year.

Section 75-02-02.1-24. Spousal impoverishment prevention. This section was amended to clarify that spousal impoverishment prevention is available to couples with one member receiving "home and community based services" as well as to couples with one member receiving nursing facility services, to describe how the

spousal share of assets must calculated and considered available in a way that aligns with federal statutory requirements, to provide that an uncompensated transfer of assets by the community spouse is governed by section 75-02-02.1-33.1, disqualifying transfer, to extend the period of time within which the institutionalized spouse may transfer assets to the community spouse, to remove references to excluded assets that are consolidated in new section 75-02-02.1-28.1, and to cap the community spouse monthly maintenance needs allowance at the current maximum permitted under federal law ($2267 per month).

Section 75-02-02.1-24.1. Breast and cervical cancer early detection program. This is a new section added to define and explain the breast and cervical cancer early detection group, and to implement the provisions of SB 2089, removing the sunset clause on the 2001 law establishing this coverage group.

Section 75-02-02.1-25. Asset considerations. This section was amended to clarify when assets are actually available for determining eligibility, and to implement the provisions of SB 2074, removing the sunset clause on the elimination of the asset test for families' and childrens' coverage groups.

Section 75-02-02.1-26. Asset limits. This section was amended to clarify asset limits used in determining eligibility, and to implement the provisions of SB 2074, removing the sunset clause on the elimination of the asset test for families' and childrens' coverage groups.

Section 75-02-02.1-27. Exempt assets. **This section was amended to clarify when a motor vehicle will be considered an exempt asset, and to delete reference to funds distributed under the Old Age Assistance Claims Settlement Act.**

Section 75-02-02.1-28. Excluded assets. **This section was amended to provide when property essential to earning a livelihood, a business entity ownership interest, conservation reserve program property, rental or lease income and liquid assets for the operation of a trade or business, burial funds, crime victim aid, life estates, mineral acres, Vietnam veteran allowances, and assets received from a decedent's estate may be excluded**

Section 75-02-02.1-28.1. Excluded assets for medicare saving programs, qualified disabled and working individuals, and spousal impoverishment prevention. **This is a new section added to consolidate into a single section the list of assets that may be excluded for Medicare savings program eligibility, qualified disabled working individuals and spousal impoverishment prevention.**

Section 75-02-02.1-29. Forms of asset ownership. **This section was amended to clarify the difference between liquid assets other forms of personal property, and to relocate, from section 75-02-02.1-32, valuation of assets, provisions regarding how life estates must be treated.**

Section 75-02-02.1-30. Contractual rights to receive money payments. **This section was amended to relocate, from section 75-02-02.1-32, valuation of assets, a description of contractual rights to receive money payments.**

Section 75-02-02.1-30.1. Annuities. **This is a new section that describes how annuities are to be treated in determining eligibility. The Department is concerned that portions of this section may be construed as conflicting with the provisions of 2003 SB 2384, and so requests the Administrative rules committee agree to the repeal of this section pursuant to the provisions of N.D.C.C. § 28-32-18(3).**

Section 75-02-02.1-31. Trusts. **This section was amended to replace the word "property" with "assets", to clarify that trusts include escrow accounts, investment accounts, conservatorship accounts, and any other legal instruments, devices, or arrangements managed by an individual or entity with fiduciary obligations, to provide that the eligibility determinations must include efforts to ascertain the intent of the grantor, to clarify Medicaid treatment of a revocable trust and a support trust, to remove the subsection describing discretionary trusts, and to provide when a trust is established with respect to a trust asset.**

Section 75-02-02.1-31.1 Trusts established by applicants, recipients, or their spouses after August 10, 1993. **This section was amended to replace references to "aid to families with dependent children" with references to "temporary assistance for needy families", to provide that this section does not apply to certain trusts for individuals with disabilities to the extent the person establishing the trust has lawful authority over the individual's assets, to incorporate the provisions of 2003 SB 2047, concerning trusts for individuals with disabilities, and to provide clarification of how trusts established and managed by nonprofit associations will be treated.**

Section 75-02-02.1-32. Valuation of assets. **This section was amended to clarify acceptable sources of valuation of assets and to clarify life estate and contractual rights to receive money payments valuations.**

Section 75-02-02.1-33.1. Disqualifying transfers made after August 10, 1993. **This section was amended to remove "made after August 10, 1993" from the title of the section, to clarify the applicable "look back" period for disqualifying transfers, to clarify treatment of transfers of excluded and exempt assets, to describe how undue hardship may be established, to clarify when services provided by a family members are treated as consideration for a transfer of assets, several terms used in the section, and to create exceptions to treatment of disqualifying transfers for transactions relating to the purchase of certain long term care insurance coverage as required by 2003 HB 1469 and the purchase of certain annuities as required by 2003 SB 2384 .**

Section 75-02-02.1-34. Income considerations. **This section was amended to clarify what income will be considered in determining eligibility.**

Section 75-02-02.1-36. Disregarded income. **This section was repealed and is replaced by clarified provisions in new sections 75-02-02.1-38.1, post-eligibility treatment of income, and 75-02-02.1-38.2, disregarded income.**

Section 75-02-02.1-37. Unearned income. **This section was amended to distinguish "unearned income" from "earned income" and to clarify what types of income will be considered unearned.**

Section 75-02-02.1-38. Earned income. **This section was amended to clarify what types of income will be considered earned income and how earned income should be calculated and attributed.**

Section 75-02-02.1-38.1. Post-eligibility treatment of income. **This is a new section that describes specific financial requirements for determining the treatment of income and application of income to the cost of care for an individual needing nursing care services once Medicaid eligibility is established.**

Section 75-02-02.1-38.2. Disregarded income. **This is a new section that defines when income will be disregarded.**

Section 75-02-02.1-39. Income deductions. **This section was amended to clarify that it applies to an individual residing in his or her own home or in a specialized facility and to the Medicare savings program, but does not apply to those cases in which section 75-02-02.1-38.1 applies, and to clarify deductions allowed from income.**

Section 75-02-02.1-40. Income levels. **This section was amended to clarify the income levels for each coverage group, to provide an explanation of the method of determining the appropriate income level in the case of a child who is living outside of the parental home but who is not living independently or a spouse who is temporarily living outside of the home to attend training or schooling, to secure medical treatment or for other reasons listed, to provide when an individual shall be included in the family unit for purposes of determining family size and to provide when certain income levels are effective.**

Section 75-02-02.1-41. Deeming of income. **This section was amended to clarify how income in excess of medical need is calculated and "deemed" to be available to relatives whom an individual has a duty to support.**

Section 75-02-02.1-41.1. Recipient liability. **This section was amended to limit to fifteen dollars the amount of medical bills incurred, prior to the month for which Medicaid eligibility is being determined, in calculating recipient liability.**

8. **A constitutional takings assessment was prepared and is attached report.**

9. **Two of these sections were adopted as emergency (interim final) rules: section 75-02-02.1-19.1 regarding the family coverage group and section 75-02-02.1-41.1 regarding recipient liability. Emergency rulemaking was necessary because a delay in implementing these rules was likely to cause a loss of funds to support a mandatory duty imposed upon the Department. At the time these rules were implemented, the Medicaid program had a projected shortfall of $14 million in general funds. These rules were implemented as emergency rules in order to preserve funds during the remainder of the 2001-2003 biennium to meet federally imposed obligations under the Medicaid program. If the Department had failed to take adequate steps to address the projected deficit, sufficient funds may not have been available to meet obligations imposed on the State by the federal government.**

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July 16, 2003